JD–38–08
Washington, DC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE WASHINGTON POST

and

Cases 5–CA–33037
5–CA–33503

WASHINGTON-BALTIMORE NEWSPAPER GUILD
LOCAL NO. 32035 a/w TNG-COMMUNICATIONS
WORKERS OF AMERICA, AFL–CIO–CLC

Stephanie Cotilla, Esq., for the General Counsel.
Robert E. Paul, Esq., of Washington, DC,
for the Charging Party.
Willis Goldsmith, Esq., of New York, NY, *Jacqueline Holmes, Esq.* and *Joanne Bush, Esq.*, of Washington, DC,
for Respondent.

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed by Washington-Baltimore Newspaper Guild Local 32035, a/w TNG-Communications Workers of America, AFL-CIO-CLC (the Union or the Guild) on April 28, 2006, an amended charge filed on July 28. 2006, and a charge filed on March 14, 2007, the Regional Director for Region 5, National Labor Relations Board (the Board), issued a consolidated complaint on June 29, 2007, alleging that The Washington Post (Respondent) had committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Washington, DC, on October 23 through 30 and on November 19, 2007, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the parties have been given due consideration. Upon the entire record and from my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

Respondent is a Delaware corporation with an office and place of business in Washington, DC, engaged in the business of the publication and distribution of a daily newspaper distributed directly to the District of Columbia, Maryland, Virginia, and other states. During the twelve-month period preceding June 29, 2007, a representative period, Respondent, in conducting its business operations, derived gross revenues in excess of $200,000, it was a member of, and subscriber to, various interstate news services, and it regularly carries in its publications advertisements of nationally sold products. Respondent admits, and I find, that at

all times material it was an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent's employees are represented by seven different unions. Since approximately 1938, the Guild has been the exclusive collective bargaining representative of one of the units of Respondent's employees. The current collective bargaining agreement between the parties describes that unit, consisting of between 1,200 and 1,300 employees, most of whom work in the news and editorial or in the commercial departments, as

> all employees employed by The Washington Post in the Accounting, Administrative Services, Advertising, Circulation, Communications, Editorial, Marketing, News and Purchasing departments; other business departments to the extent that Guild-covered positions are transferred to such other business departments; and to data processing employees of the Systems and Engineering Department; the maskers and scalers of the Production Department; the Centrex Operators, Printing Services and Mail Desk employees of the Administrative Services Department; and National Weekly and News Service employees.

The unfair labor practices alleged in the complaint arise from two business ventures undertaken by Respondent in 2006 and 2007. In the first Respondent entered into an agreement with Bonneville International Corp. (Bonneville), which owns and operates a number of radio stations nationwide, to provide content for a new radio station in the Washington, DC area, to be known as Washington Post Radio (WPR). In the second Respondent, through one of its subsidiaries, Express Publications Co. (Express), entered into a services agreement with The Onion Express, LLC, an unrelated entity, to provide publication, distribution, and advertising sales services for a satirical weekly publication, known as the "*Onion*," similar to the services Respondent provided to Express in connection with its own publication, a free weekday tabloid.

A. Allegations Concerning Washington Post Radio

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by its admitted refusal to bargain over the effects of WPR on the bargaining unit, by refusing to provide information requested by the Union concerning WPR, and by bypassing the Union and engaging in direct dealing with bargaining unit employees by negotiating compensation and other terms of employment with individual employees who participated in providing content for WPR. Respondent contends that its refusal to engage in mid-term bargaining was lawful. It asserts that there was no significant change in those employees' working conditions, that the collective bargaining agreement between the parties gave it the right to unilaterally assign work, subject only to an obligation to meet and confer with the Union about those assignments, and that it did not engage in unlawful direct dealing with employees because the contract gives it the right to bargain individually with employees for compensation above the contract's minimum salaries.

The agreement creating WPR was reached on January 3, 2006, after approximately 5 months of discussions between Respondent and Bonneville and the station began broadcasting on March 30, 2006. The agreement provided that the station would be on the air from 5:00 a.m. to 7:00 p.m. on weekdays and from 6:00 a.m. to 5:00 p.m. other days and that Respondent would provide reasonable access to its reporters, columnists, and editors for interviews, discussions, development of story ideas, and news coverage. Basically, Bonneville was to

provide the station's transmitting facilities and radio expertise as well as professional announcers and program hosts, while Respondent was to provide the content for the broadcasts, including appearances by its reporters and columnists. Tina Gulland, Respondent's director of radio and television projects oversaw the WPR operations on Respondent's side along with three coordinators hired to arrange and work on the radio programming from The Post newsroom. An existing studio in Respondent's building was upgraded for use by WPR. Some programs originated there, while others were broadcast from Bonneville's studio.

At about the same time that Respondent was discussing launching WPR with Bonneville, it was engaged in negotiating a new collective bargaining agreement with the Union. An agreement was reached, effective November 8, 2005. The Union first learned about WPR and that bargaining unit employees would be involved, in a letter dated January 4, 2006, from Respondent's Vice President of Labor Patricia Dunn to Union representative Richard Ehrmann. The letter stated that WPR would begin broadcasting in March and that Post editors and reporters would have the opportunity to participate. By letter dated January 13, Ehrmann requested information concerning WPR and representatives of The Post and the Guild held a meeting on January 24. Respondent told the Union that the station was an opportunity to build the Post's circulation and revenue and that appearances on WPR by newsroom employees would be "voluntary" and no one would be penalized or adversely affected for declining to participate. It also said that participation would be considered in determining employees' overall performance evaluations and eligibility for merit pay. In answer to a question about compensation, Gulland said that the employees appearing on WPR during regular work hours would not be paid, that appearances outside of those hours would be compensated, but that the amounts had not been determined. The Union was told that program guides had not yet been produced and that the other documents it had requested were confidential. Thereafter, Ehrmann reiterated his request for information and on March 2 Respondent made available a redacted copy of its agreement with Bonneville for review by Ehrmann and Union counsel Robert Paul. After WPR began broadcasting, Ehrmann made another information request on April 6 seeking the names of unit employees who had appeared on the station thus far, the nature and length of the appearances, and the amount of compensation paid. Respondent provided the names and a brief description of each appearance but did not provide the amounts paid for specific appearances.

Ehrmann testified that he believed that the creation of WPR had a "huge" impact on bargaining unit employees and that the Union had a right to bargain over the compensation and other working conditions connected with the radio work they would be doing. On March 2, the Union delivered to Respondent a demand that it bargain about the effects of the use of unit employees in connection with WPR. By letter dated March 7, Dunn rejected the Union's bargaining demand, asserting that it was untimely and that the parties' collective bargaining agreement gave Respondent "broad rights to manage its operations and assign its staff, and imposes no restrictions on The Post's right to involve employees in multi-media work assignments - - as it has done for many years."

The parties agreed to meet and did so on March 22. They reiterated their positions concerning the obligation to bargain, the Respondent provided some additional information concerning WPR. The Union presented a contract proposal providing for minimum compensation for work to be performed for WPR and assuring that such work would be voluntary. Respondent continued to decline to engage in bargaining which led to the Union filing an unfair labor practice charge with the Board.

On March 27, Respondent held a meeting with newsroom personnel to discuss WPR. A transcript of the meeting in the record shows that Gulland said that Respondent would be

responsible for providing Washington Post content from 5:30 a.m. until 7:00 p.m. In answer to an employee's question, Executive Editor Leonard Downie told employees that their compensation, which was calibrated on performance, would in the future also depend on their cooperation with WPR and that it would be a factor in determining salaries and merit raises. Downie stated that there would be compensation for some WPR work and that participation in WPR was "voluntary." He also said that "the compensation here is not by piece work, it's by total contribution to the paper."

During the approximately 18 months that WPR was on the air bargaining unit employees made hundreds of appearances on the radio station. Some appeared daily or weekly at regularly scheduled times and others less frequently. Initially, sections of the newspaper that appeared in print once a week had specific timeslots to fill, timed to promote interest in that section on the eve of its appearance in print and featuring reporters and editors from the section. Home Section reporters Anne Groer and Jura Koncius did a weekly show of varying lengths throughout the duration of WPR, initially on Wednesdays, sometimes related to a story that would appear in that section the next day, sometimes involving a story they previously done, and other times relating current happenings. At the beginning, on the morning of their show, they went directly to the Bonneville studio rather than to the newspaper. In preparation, they researched the topic of the show, wrote out a script, and sometimes arranged for guests who appeared with them on the show. Groer estimated they spent about 2 to 21/2 hours per week on the show. At the outset, they were not paid but after learning that others appearing on WPR were being paid and making an inquiry, they began to receive compensation. When their WPR show ran about a half hour, they were paid $50 and $25 when their air time was reduced and the amounts were included in their paychecks. Groer testified that before WPR, she had appeared once or twice a year on other radio stations or networks. Those appearances were arranged directly with the show producers and, if she was paid for her appearance, the payment came from the station or network, not The Post. The appearances were not taken into consideration in connection with her job performance evaluations at The Post. She testified that to some extent her work for WPR involved a different skill set than her print journalism. In 10 years prior to WPR, Koncius had made only one or two brief appearances on the radio.

Reporter Alan Cooperman testified that he enthusiastically volunteered to appear on WPR and considered it a part of his job. He did a weekly hour-long show on religion from the spring of 2006 until spring of 2007 when the format was switched to an eight-minute segment. He came up with topics for the shows and they may or may not have been something he was reporting about. He lined up guests and pre-interviewed them, and prepared background information, a script, and suggested questions for the show's host. He testified that he spent 2 to 3 hours of concentrated working time preparing each show and was paid $100 per show. He also made 5 to 10 minute appearances during which he was interviewed about stories he had written for the newspaper and was paid $25 for such appearances. He said that he felt that the amount of time he invested in work for WPR affected his reporting output. Prior to the advent of WPR, he had made brief appearances on other radio stations 2 or 3 times a month, commenting on stories he had written. The few times he was paid for such appearances the payments came from the station or network and the appearances were not taken into consideration in his performance evaluations. He said he did not consider such appearances to be a part of his job and he felt that he could and sometimes did decline to make them. Cooperman described one instance in which he covered a "Save Darfur" rally and interviewed rally participants in connection with his WPR show. This was not part of his regular print journalism reporting and resulted in his working several hours on a weekend.

Other reporters and columnists gave similar testimony to the effect that prior to WPR they had appeared on radio and televisions stations and networks in connection with their

Washington Post journalism. With the exception of individuals who had contractual arrangements with entities such as MSNBC, such freelance appearances, by and large, were sporadic and brief. In all cases, if any compensation was involved, it came from sources other than the Respondent and the appearances were not a factor in an employee's performance evaluation. In some cases there was some additional work involved in preparing for WPR appearances and some employees had to make accommodations to fit their appearances into their and the station's schedules, such as, appearing prior to normal working hours and on weekends. None of the witnesses indicated that they felt any coercion to participate in the WPR radio broadcasts.

B. Allegations concerning the *Onion*

Since 2003, a subsidiary of the Respondent has published a free weekday tabloid newspaper called Express. Pursuant to an agreement with the subsidiary, Respondent has provided it various services, including marketing, prepress and printing, distribution, and accounting services. Respondent has also provided a sales force to sell advertising for Express and has done the billing and collection for all the advertising sold. In early 2007, Express entered a partnership with the publisher of the *Onion* and Respondent agreed to provide, on the same basis, services similar to those it provided for Express. The *Onion* is a free weekly satirical tabloid. There are approximately 50 sales representatives in Respondent's advertising department. They were informed at a staff meeting on January 8, 2007, that two new sales representatives were being hired specifically to sell advertising for the *Onion* and that the other department sales reps would also be selling advertising for the *Onion* as well as the other Washington Post products they were selling at the time, including, Express and El Tiempo Latino, a weekly Spanish language newspaper. The sales reps were to receive a "spiff," a term meaning a bonus paid for sales of ads for a specific product, in connection with sales for the *Onion*. Sales for the *Onion* were to be included in the overall sales goals of the sales reps. There was testimony that continued failure to meet one's sales goals, without a justifiable reason, can adversely affect a sales rep and could ultimately result in discipline or discharge; however, there is no evidence that any employee was ever disciplined for failure to meet a sales goal in connection with the *Onion*. A unit of the advertising department also became responsible for pagination of the *Onion.*

By letter dated January 12, 2007, Ehrmann requested that Respondent provide the Union with information concerning the work that unit employees would be doing in connection with the *Onion*, including all documents that touched upon that work. By letter dated February 6, Respondent described the services that bargaining unit employees would provide for the *Onion* but provided no documents. By letter dated February 15, Ehrmann reiterated his request for information, asked for the names of the persons who negotiated the agreement with the *Onion*, and requested that Respondent bargain about the effects on unit employees doing work for the *Onion.* By letter dated February 21, Respondent responded that the information request was overbroad and vague and sought documents from entities with which the Union had no contractual relationship. It provided a copy of the agreement between it and Express relating to the latter's joint venture with the *Onion* and offered to meet and confer about the issues but declined to bargain, asserting, that there was no material effect on unit employees doing work for the *Onion* and that the contract between the parties permitted such assignment of work. The parties had a meeting on March 7 to discuss the duties unit employees would perform in connection with the *Onion*, at which Respondent maintained its position that it was not obligated to bargain

C. Analysis and Conclusions

There is no contention here that Respondent had an obligation to bargain with the Union over its decision to create and operate WPR or provide services to the *Onion*. These management decisions, in effect, involved a choice of product type and method of product distribution, had only a limited indirect impact on the employment relationship, and did not require bargaining. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *KIRO, Inc.*, 317 NLRB 1325, 1326-27 (1995). However, the General Counsel asserts that the Employer was obligated to bargain over the effects of its decisions on bargaining unit employees. If those effects were "material, substantial, and significant," changes to the employees' working conditions, they were mandatory subjects of bargaining. *The Bohemian Club*, 351 NLRB No. 59, slip op. at 2 (2007); *KIRO, Inc.*, at 1327.

Respondent contends that assignments of employees to duties connected with WPR and the *Onion* were additional steps in the continuing evolution taking place in the newspaper business and that these assignments caused no significant changes to the working conditions of unit employees because they had the same basic job responsibilities, under the same terms and conditions as before. It asserts that employees received the same compensation, that they had the same responsibilities as before. In the case of WPR, this involved producing content that appeared on a wide range of multimedia platforms, that their participation was voluntary as it was with other multimedia ventures, that they were evaluated according to the same performance standards that applied to both print and multimedia contributions, that their merit pay continued to be based on their overall contributions to Post journalism, and that their participation did not significantly increase working time or affect their work schedules.

The Board has held that adding more than a minimal amount of duties or work time can constitute a material, substantial, and significant change in conditions of employment. E.g., *The Bohemian Club*, at 2; *Verizon New York, Inc.*, 339 NLRB 30 (2003); *KIRO, Inc.*, at 1326-27; *Rangaire Co.*, 309 NLRB 1043 (1992). In the case of the *Onion*, there was no evidence that employees were impacted in any significant way. Sales representatives sold ads for the *Onion* in the same manner as they had done for a variety of products in Respondent's advertising portfolio. Although the General Counsel and the Charging Party assert that the addition of sales for an unrelated entity such as the *Onion* was unprecedented and amounted to "renting out" bargaining unit employees, they presented no testimony from any such representative to establish that his or her working conditions were materially and significantly changed. As noted, Respondent hired two new sales representatives who were primarily responsible for ad sales for the *Onion* while other representatives received spiffs for any ads they sold. The testimony of Keith Mont concerning the pagination work unit employees do in connection with the *Onion*, amounting to a total of three hours a week, failed to establish that any employee worked more hours per week or did any work that was substantially different from what they had done before. The evidence fails to establish any material and significant change in the paginators' overall job responsibilities or that the fact that the *Onion* is owned by a third party in any way impacted their working conditions. I find that Respondent's provision of services to the *Onion* did not require effects bargaining with the Union.

Before and after the launch of WPR, in addition to the newspaper, bargaining unit employees provided the content for a variety of multimedia journalism "platforms" such as The Post's websites; local, cable, and network television news programs; local and network radio news programs; as well as and writing blogs and participating in on-line chats. Several employee witnesses credibly testified that their appearances on WPR increased their hours and workloads and required them to work outside their normal work hours. Even assuming that on occasion a reporter pursuing a news story will work additional and/or unscheduled hours, being

on the WPR program schedule required many to do so on a regular basis and in that sense changed their working conditions. They also testified that in many cases they acted as producers for their radio shows, lining up guests and preparing scripts, things not normally a part of their reporting. Perhaps, most indicative of the significant changes in employees' working conditions engendered by their participation in WPR, was that Respondent began to compensate them for their radio appearances. While several had made radio and television appearances in connection with stories they had covered for the newspaper, their compensation, if any, came from those media entities, not from the Respondent. From the beginning of WPR, employees who made brief appearances during their normal working hours were not paid for those appearances. However, Respondent's payroll records show payments to employees making WPR appearances ranging from $40 to $1,500 per pay period, based on the length, frequency, and timing of an individual's appearance(s). While it is argued that all of the employees' appearances on WPR were "voluntary," the fact is Respondent was contractually committed to provide all of the content for the station and access to its reporters and editors and employees were told that their contributions to it would be a factor in determining their merit pay which is based on their overall contribution to The Post.[1] I find that in these circumstances employees' work assignments were changed and that the changes were material, substantial, and significant.

Respondent contends that even if the General Counsel has proven that material, substantial, and significant changes to employees' work assignment were made, the Union waived any right to bargain mid-term over work assignments and above-scale compensation. It asserts that in Article II of the parties' collective bargaining agreement the Union gave it the right to make changes in work assignments subject only to an obligation to "meet and confer," not bargain, about those assignments. In Article IX, it is given the right to bargain individually with employees for wages and other working conditions beyond the contract's minimum standards. The General Counsel and the Charging Party contend that the evidence fails to establish any waiver of the Union's right to demand effects bargaining over WPR and the *Onion*, that there is no express contract provision that does so, no evidence that a waiver of such right was consciously explored and intentionally relinquished, and that past practices relating to "web work" do not apply to the issues in this case.

To establish a waiver of the statutory right to bargain over changes in terms and conditions of employment, settled Board law requires that the party asserting waiver must establish that the right has been clearly and unmistakably relinquished. E.g., *Provena St. Joseph Medical Center*, 350 NLRB No. 64, slip op. at 4-5 (2007); *TCI of New York*, 301 NLRB 822, 824 (1991). This standard has been approved by the Supreme Court. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1981). A union's waiver of its right to bargain over particular subject matter may be found in the express language of the collective bargaining agreement, or may be inferred from the parties' bargaining history, past practice, or a combination of those factors. *KIRO, Inc.*, above at 1327-28; *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989); *United Technologies Corp.*, 274 NLRB 504, 507 (1985). The Board requires that the matter at issue have been fully discussed and consciously explored during negotiations and that the union consciously yielded or clearly and unmistakably waived its interest in the matter.

There is no dispute but that the newspaper business has changed over the years and continues to do so. Similarly, the ways that employees in that business do their jobs has also changed, particularly, in the area of electronic media. In 1994, a subsidiary of the Washington

[1] Respondent's argument that there is no evidence that WPR appearances played any role in merit pay decisions is not persuasive given Downie's statement that it would.

Post Company, Digital Ink Co., began making available to subscribers online a version of The Washington Post and news from other sources. When Digital Ink was announced, the Union requested a meeting with Respondent to discuss the impact on unit employees and expressed its concern that it might result in the loss of jobs. At the meeting, Respondent stated that it anticipated that there would be more work for the employees rather than any loss of work or jobs. The Union took no further action with respect to Digital Ink at that time but during the negotiations that resulted in the 1995 collective bargaining agreement, it sought to represent the employees of Digital Ink, a proposal that it ultimately dropped.

While counsel for the General Counsel and the Charging Party contend that all that is relevant in this case is what happened immediately prior to the launch of WPR and the *Onion*, the Respondent contends that the lengthy bargaining history between the parties concerning the expansive flexible work assignment provision in the collective-bargaining agreement on which it relies must be examined to get a true picture of what happened and what the parties understood to be happening from the time it was agreed upon in the 1995 contract to the present.

Respondent's current Vice President of Labor Patricia Dunn testified concerning the 1995 collective bargaining negotiations between the parties during which she served as outside counsel. Much of the Respondent's evidence consists of Dunn's testimony and bargaining notes covering various negotiations involved here. I found her to be a knowledgeable and credible witness and most of her testimony and what is in her notes was not disputed.

Dunn testified that from the outset of the 1995 negotiations, Respondent's chief negotiator, Frank Havlicek, who is now deceased, emphasized that the newspaper industry was changing rapidly and that Respondent needed to replace what it considered an "outdated" contract with one that would give it broad flexibility to operate its business and to limit the Union's ability to make midterm challenges. Michael Mauer, a member of the Union's bargaining team, testified that Havlicek made it clear that "jobs would change" and employees would have different responsibilities and would be asked to perform different tasks or combinations of tasks than they had previously performed. A bulletin distributed by the Union to its members in April 1995 advised them that one of the Respondent's objectives in the negotiations was to get contract changes that would give it greater flexibility in assigning work. Throughout the negotiations, Havlicek repeated the theme that jobs would be changing as the economy and technology changed and that Respondent needed work assignment flexibility.

Dunn testified that to accomplish its objectives, Respondent proposed new language in "Article II – Jurisdiction" replacing what it believed were "archaic" limitations on its rights to assign work, including restrictions on adding to or taking away from the work previously assigned to unit employees, with a broader flexible work assignment provision that allowed it to assign such work to unit employees, non-unit employees, or employees of another employer and limiting the means of resolving disputes over such assignments. Dunn said that the Union was not comfortable with the proposed expansion of Respondent's right to assign work and did not want to be foreclosed from negotiating midterm about changes in jobs or salaries for changed jobs. Respondent said that if the Union felt it needed to protect its interests it should make a proposal that they could bargain about. The parties eventually agreed to set up a labor/management committee to meet on a monthly basis to discuss issues concerning work assignments arising midterm. Respondent's bargaining notes from a negotiating session on May 30 indicate that Havlicek described it as a consultation committee, not grievance and arbitration, and not a bargaining mechanism. At another bargaining session on July 18, 1995, Havlicek told Mauer that to meet and confer about work assignment issues meant not negotiate and not arbitrate. Dunn testified that the meaning of "meet and confer" was discussed several times during the negotiations, that Havlicek explained that it did not mean arbitrate or bargain,

and that she did not think there was any doubt expressed by anyone as to what it meant. Dunn also described a discussion on June 7 in which Havlicek attempted to persuade the Union to accept the work assignment flexibility Respondent was seeking. He spoke about the contentious history between the parties and the importance of changing their relationship by moving to consultation instead of confrontation. At the request of the Union, the Post's general manager attended a negotiating session on June 27 and made a presentation concerning the changing business environment and the challenges facing it, which Respondent felt necessitated the significant change in the nature of the contract it was seeking. During a July 5 discussion concerning the Respondent's flexible work assignment proposal, Havlicek explained that existing contract language concerning "normally assigned" work was outdated and unacceptable and had to be changed inasmuch as economic and technology caused things to change on a daily and weekly basis. He said that flexible work assignment was a fundamental proposal for The Post and that the parties had to put behind them the notion that things could not change. In response, one of the Union's negotiators Carol Rosenblatt stated that the language Respondent proposed "opened the door" to assigning work any way it wanted. Another Union representative Frank Swoboda expressed the view that what Respondent was seeking amounted to a "sea change" in the work assignment area. This was consistent with the language of the proposal that "it is the intent of the parties to construe this Agreement as fundamentally altering the nature of work assignments." Havlicek told the Union to make a proposal if they thought The Post's proposal was too broad. In July, the Union offered its first flexible work assignment proposal, limited to certain employees, which called for meeting and conferring and arbitration. Thereafter, parties continued to exchange proposals on work assignments and in September reached tentative agreement on language providing that The Post would "meet and confer" with the Union on changes in work assignments, jurisdiction, work processes, and technology but, with one specific exception involving new or drastically changed positions, such changes would not be subject to challenge through arbitration or midterm bargaining.

From the outset, The Post made it clear that, in recognition of the rapidly changing environment in the newspaper business, its fundamental goal in these negotiations was to have the freedom to make changes in work assignments to an extent never previously experienced and to limit the Union's ability to make midterm challenges to its actions. Comments by Union representatives made it clear that understood the nature and the implications of the "sea change" that The Post was seeking. The Union made counter-proposals, but in the end it agreed to give The Post the flexible work assignment authority it was seeking, subject only to an obligation to meet and confer with the Union which the parties understood did not mean negotiating and did not mean arbitrating. The subject was fully explored and the Union consciously yielded.

Along with the right to make work assignments which would not be subject to midterm challenges in Article II, Respondent also proposed a broad "fully bargained" or "zipper" clause provision in Article XXV to complement that right. The zipper clause provided that the entire agreement is within the four corners of the contract and all mandatory subjects of bargaining have been fully bargained and resolved for the contract term regardless of whether there were actual proposals concerning those subjects. Havlicek explained that its purpose was make it clear that The Post had the right to make changes, as the newspaper business changed, unless it was specifically limited by the language of the contract. He said that, if the Union wanted to restrict those rights, it should make a proposal and they would negotiate. The Union's counter-proposal on June 30 limited the zipper clause to only matters that had actually been proposed and discussed during the negotiations. The Union explained that it wanted the right to bargain midterm about anything that had not been raised at the table. Havlicek rejected this saying that they were bargaining now and, if the Union wanted to restrict The Post, now was the time to

make a proposal and negotiate. Otherwise, it was waived for the contract term. The parties continued to exchange proposals on this issue with the Union expressing concern over the possibility that jobs might change during the contract term. Eventually, they agreed on the zipper clause as proposed by The Post, but providing a mechanism for addressing the creation of new jobs or substantial changes in jobs so drastic that they amounted to new jobs during the contract term, whereby, the parties could negotiate for a term of ten days but then The Post would be free to implement the appropriate job or salary classification. During the parties' contract negotiations in 1998, the work assignment provision in Article II was unchanged. The Union proposed deleting the zipper clause in it entirety but it was included in the new contract.

As The Post had predicted in 1995, the newspaper business continued to change. In 1996, Digital Ink was replaced by www.washingtonpost.com, a website operated by a subsidiary of the Washington Post Company, known as Washington Post.Newsweek Interactive (WPNI) which made stories written for the print version of The Post available to the general public. In September 1999, Respondent launched PM Extra, a website on which reporters' stories from the print version of The Post were displayed and were updated by reporters during the day. In November 1999, Respondent entered into an alliance with other entities, including Newsweek, WPNI, NBC News, MSNBC Cable to share news material and resources. As a result, some Washington Post reporters made appearances on NBC local and national news programs and on MSNBC Cable. In July 2003, Respondent announced that it was instituting a "Continuous News Department," increasing its commitment to its growing web audience, a "significant share" of which it had found did not read the print edition of the newspaper.

In a letter dated February 15, 2002, from Ehrmann to Dunn, the Union noted that newsroom employees were being asked to perform additional work related to PM Extra, WPNI, and MSNBC and by conducting online chat groups. It requested midterm bargaining in connection with those matters as well as unit members' "contributions to online and cable productions and other new ventures." Dunn offered to meet and confer about these matters but told Ehrmann that The Post's position was that it was not required to bargain based on the work assignment, individual bargaining, and zipper provisions in the parties' agreement which waived the Union's right to bargain midterm. The Union subsequently withdrew its bargaining demand and agreed to meet and confer with The Post about its concerns. In a bulletin to members, dated September 18, 2000, the Union advised them that although it had been trying for six months to get The Post to negotiate new terms to cover some of the additional work, The Post's lawyers had "invoked the company's legal right to ignore such pleas until new contract negotiations in 2002." During the meetings, the Union expressed its concerns including that employees were doing added work resulting from new ventures, compensation, and writing for "another company." Dunn testified that The Post reiterated its position that reporters were paid to write about the news and the platform on which the Post presented their product was not relevant.

In a bulletin, dated February 9, 2001, the Union complained of what it considered the increased uncompensated work members were doing and stated, "we have put The Post on notice that these issues will be front and center a year from now when the Guild begins formal bargaining with The Post for a new contract." Those negotiations began in March 2002. In its initial contract proposal, the Union provided that no employees "shall be required to write for WPNI/Washingtonpost.com," that no employees "shall suffer adverse consequences as a result of declining to contribute original work to WPNI/Washingtonpost.com or any other third party," and that a committee shall be formed to create a system of compensation for work performed on WPNI/Washingtonpost.com. A second Union proposal was revised to apply to "original work for publication in WPNI/Washingtonpost.com or any other outlet other than the Washington Post newspaper." A third revision referred to "material intended primarily for distribution to The

Washington Post website or other third party distributor." Dunn testified that the Union expressed as it objective assuring that such work would be voluntary and could not be required and that because the issue of compensation for such work was so "complicated" it wanted to put it off until after the contract was signed. Dunn said that she responded to the Union by explaining that writing news stories and producing content was a fundamental part of a reporter's job and the fact that it might end up on a web or other platform did not make it "extra work warranting extra compensation and that The Post would not be willing to agree that employees could refuse to do such work." She said she emphasized that The Post was unwilling to be restricted in the nature of work assignments. She also said that with respect to of compensation for such work, she needed the Union to make a proposal so that they could bargain about it at the table and not have a committee deal with it midterm. She said the response was that it was too complex an issue to deal with in the bargaining process. The Union ultimately dropped its proposal concerning this work and a committee to address compensation issues. Dunn testified that during the 2002 bargaining the Union made no proposal to modify the contract provisions concerning flexible work assignments, individual bargaining, management rights, or the zipper clause.

The Post started its Continuous News desk in 2003 with the announced goal of growing its web and multimedia journalism. It increased its staff which was to perform web work as well as radio and television appearances. This resulted in the Union filing two grievances, one, over the unilateral imposition of additional reporting and writing duties and unilateral change in criteria for compensation for Continuous News desk work and a second asserting that two new positions in the Continuous News department were new because they had multimedia responsibilities. The parties met to discuss the grievances and the Union asserted that the positions' multimedia responsibilities, including web, radio, and television work, were so different that they were subject to the exception to midterm bargaining. Dunn said that The Post denied that grievance because the positions did not involve anything substantially new; that employees had been doing such work for some time and a there was a classification in the contract covering basic compensation for it. The Union dropped the grievance over the new multimedia positions and the parties met and conferred several times about the other grievance which apparently was never resolved.

When the Express was launched in 2003, the Union demanded bargaining over the alleged change in working conditions and filed a grievance asserting that The Post had made significant changes in working conditions which were precluded by the fully bargained clause of the collective-bargaining agreement. The Post responded that the duties assigned in connection with the Express were done pursuant to the flexible work assignment provisions in Article II of the contract, there was no obligation to engage in midterm bargaining, that no employee had experienced a change in working conditions, and it offered to meet and confer with the Union. The parties met and discussed the Union's concerns and it did not pursue its grievance or its bargaining demand.

In 2005, The Post's parent company purchased El Tiempo Latino (ETL), a free weekly Spanish-language newspaper and The Post provided sales and other services pursuant to a services agreement similar to that it had with Express. At least one new sales employee was added to sell ads for it and other the sales representatives received spiffs for ads they sold. The Union took no action concerning the addition of ETL sales work because, according to Ehrmann, it was a Post product and did not involve "a significant change."

During the contract negotiations in 2005, the Union made no proposals to alter the work assignment, individual bargaining, management rights, or fully bargained clauses. It did suggest that the still unresolved off-the-record talks concerning the grievance over

compensation for the Continuous News desk work be folded into the negotiations. Dunn responded that she was unwilling to do so but that the Union was free to make any proposal on the topic but the Union made no further proposal on this subject.

The foregoing findings are based on the credible testimony of Dunn, the bargaining notes, and the lack of any significant evidence to the contrary. The record shows that as far back as 1995 Respondent made the Union aware that the rapidly changing nature of the newspaper business made it essential for the parties to agree to a fundamental change in the way job assignments were handled. Respondent insisted that it have great flexibility in the way assignments were made and that its decisions, with a few limited exceptions, not be subject to arbitration or midterm bargaining. In return, the Union was assured its members' jobs would not be lost and, if problems arose, a meet and confer mechanism would be available. The Union initially opposed what one of its representatives considered this "sea change" in their relationship and another described as opening the door to Respondent's making assignments any way it chose. Notwithstanding this opposition, the parties eventually reached a contract in which the flexible job assignment, management rights, and fully bargained or zipper clauses gave Respondent exactly what it wanted.

Although the Union now apparently contends that most of this bargaining history is irrelevant and that it never fully discussed or consciously yielded any of the rights Respondent now claims, its argument is not persuasive. The Union knew from the beginning what Respondent was after and what the implications would be. Its argument that Respondent's is attempting to twist the "meet and confer" process into a waiver ignores the evidence that the parties understood that "meet and confer" did not mean bargain. It also suggests that rather than a "fundamental" change in Respondent's ability to make flexible work assignments, all The Post really sought was to limit arbitration of certain jurisdictional disputes and neither side envisioned or considered the limitations on mid-term bargaining it now claims. The record does not support this either. On occasion after 1995, when Respondent added new platforms to market its journalism, the Union demanded mid-term bargaining but eventually withdrew those demands when faced with Respondent's invocation of its work assignment rights under the contract. Moreover, during subsequent negotiations for new contracts, although Respondent pointed out that it was the time for bargaining about the issue, the Union failed to win any limitations on Respondent's rights to assign work. Respondent contends that the fact that in the 2002 contract negotiations, the Union tried to limit The Post's right to assign employees to do multimedia work, failed to achieve its goal, and eventually withdrew its proposals is further compelling evidence that the parties consciously explored multimedia work assignments and compensation and that the Union consciously yielded to its position. Although the Union asserts that its proposals only involved "web work," and not other media platforms such as radio, it has provided no support for that argument which contradicts the plain language in its proposals. Made at a time when Post employees were doing web, cable, radio, and television outlets, the various proposals spoke in terms of "WPNI/Washingtonpost.com or any other third party;" "WPNI/Washingtonpost.com or any other outlet other than The Washington Post newspaper;" and "The Washington Post Website or other third party distributor." The language clearly goes beyond "web work" and could not be more comprehensive. In the context of where unit employees were providing news content at the time, there is no reasonable basis to conclude that its proposals were limited to "web work."

I agree with Respondent's contention that by agreeing to the contract provisions concerning flexible work assignments, management rights, and the zipper clause the Union gave Respondent broad power to make work assignments as it chose subject only to the obligation to meet and confer, not bargain, as its method of challenge when disputes arose and that it also clearly and unmistakably waived any right to bargain mid-term about such

assignments. *Budd Co.*, 348 NLRB No. 85 slip op. at 2 (2006).

There is no support for the General Counsel's argument that Respondent is attempting to use the zipper clause as a "sword' rather than a "shield." As far back as 1995, Respondent made it clear what it was seeking in terms of its ability to make work assignments without having to bargain midterm. Thereafter, it relied on this contractual authority when employees were assigned to provide news content for new multimedia platforms and the Union sought to bargain midterm. I find that WPR was another of these platforms and that the Union had waived the right to bargain about unit employees performing work for it. The whole point of the contract language Respondent soughtand got was to enable it to effectively deal with a newspaper business that was rapidly and continually changing due to new technology and the way the public accessed the news products it provided. Both sides understood this and both sides understood that fundamental changes were in store if Respondent was to accomplish its goals and be successful, something in which both sides had a stake.

I find that the General Counsel has failed to establish that Respondent violated the Act by dealing directly with unit employees who appeared on WPR concerning terms and conditions of employment. For many years the collective-bargaining agreements between the parties have set minimum salaries and provided that "the right of any employee to negotiate with The Post for wages or conditions better than the minimum standards set forth in this Agreement is expressly recognized." The contract authorized The Post to engage in individual bargaining and it was clearly within its rights when it agreed to provide employees appearing on WPR with payments over and above the contract's minimum standards.

Finally, the complaint alleges that Respondent violated the Act by not providing information requested by the Union in connection with WPR and the *Onion.* In letters dated January 13 and February 9, 2006, the Union requested that Respondent provide it with

> any document in the possession of the Post, whether prepared by the Post or otherwise, that describes any plans for program content of the Bonneville International corp. radio station(s) with which the Post intends to be involved. This request includes, but is not limited to, documents such as memoranda, program schedules (whether preliminary or otherwise), and the portions of any agreement between The Post and Bonneville that address the "content-sharing relationship," in the words of Leonard Downie, Jr., between the parties.

By letter dated April 6, 2006, the Union asked for "a list of all Guild-covered employees who have appeared on Washington Post Radio to date, including their name, type of appearance (interview, etc.), length of time of the appearance, and amount of compensation received for the appearance, if any." Respondent asserts that it provided all of this information to the Union.

At a meeting of the parties on January 24, Respondent provided some information about WPR but the Union said that it needed to see the licensing agreement between The Post and Bonneville as well as programming guides which The Post agreed to produce when they became available. Thereafter, Dunn sent a letter to Ehrmann in which she attempted to summarize the terms of the licensing agreement which it considered confidential and offered to let the Union see a redacted copy of the agreement at The Post's offices. Dunn testified that on March 2, Ehrmann and the Union's attorney reviewed the redacted agreement for about 20 minutes and asked no questions about it. On March 22 it provided the Union with draft programming schedules, some information about program hosts, and some generalized information about how post employees appearing on WPR would be compensated. On April 19, it provided the Union with a list of employees who had appeared on WPR up to that point but did

not provide the specific compensation information the Union had requested.

On January 12, 2007, the Union requested that Respondent provide it with "all documents, contracts, or correspondence between The Post and The Onion that touch on work that may be performed by Guild bargaining unit employees." By letter dated February 15, 2007, the Union requested information concerning the persons who had negotiated the service agreement with the *Onion*. In response, Respondent provided the Union only a copy of its amended service agreement with Express applicable to the *Onion.* It asserts that its only obligation was to pass on the request to Express which had the agreement with the *Onion* and which declined to furnish the information to the Union. Respondent declined to name the individuals involved in negotiating the agreement between Express and the *Onion,* believing it was not relevant because neither entity employs any unit employees. It asked the Union to explain the relevance but got no response.

Pursuant to Section 8(a)(5) of the Act, an employer, upon request, has a duty to provide a union with relevant information needed to effectively represent employees covered by the terms of a collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty includes providing information relevant to contract administration. *Allison Corp.*, 330 NLRB 1363, 1367 (2000); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). The Board applies a broad discovery-type standard of relevance and the union need only make a showing that the requested information would be of use to it in carrying out its statutory duties and responsibilities. Information concerning employees covered by the collective-bargaining agreement is presumptively relevant. *Contract Flooring Systems*, 344 NLRB 925, 928 (2005); *Sheraton Hartford Hotel*, 289 NLRB 463 (1994). I find that the information the Union requested concerning WPR, including information concerning the type of work employees performed and the compensation they received was relevant and should have been provided by Respondent. In the case of the *Onion*, some of the information the Union sought concerned matters outside the bargaining unit; consequently, it has the burden of establishing that a probability that the information is relevant and would be of use to it in carrying out its statutory duties. *KIRO, Inc.*, supra, at 1328-1329. I find that the Union has met that burden. While the parties to the services agreement between the *Onion* and Express may not have employed any unit employees, Post employees were expected to performing the work involved in preparing the *Onion* for print and selling its ads. The information the Union sought would clearly be relevant to the its interest in assuring that its collective-bargaining agreement was not being breached. I find that Respondent violated Section 8(a)(5) and (1) of the Act failing to furnish all of the information requested by the Union relating to WPR and the *Onion.*

Conclusions of Law

1. Respondent, The Washington Post, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Washington-Baltimore Newspaper Guild Local 32035, a/w TNG-Communications Workers of America, AFL-CIO-CLC is a labor organization within the meaning of section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish all of the information requested by the Union relating to Washington Post Radio and the *Onion.*

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not commit any other unfair labor practices alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it should be ordered to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act. Specifically, Respondent must furnish the Union with all of the information it requested relating to Washington Post Radio and the *Onion.*

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

Respondent, The Washington Post, Washington, DC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the Union with all of the information it requested relating to Washington Post Radio and the *Onion.*

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act,

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Furnish to the Union all of the information it requested relating to Washington Post Radio and the *Onion.*

(b) Within 14 days after service by the Region, post at its facility in Washington, DC, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 13, 2006.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated Washington, DC July 18, 2008

_____
Richard A. Scully
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United states Government

The National Labor Relations Board has found we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with Washington-Baltimore Newspaper Guild Local 32035, a/w TNG-Communications Workers of America, AFL-CIO-CLC, by failing and refusing to supply it with information concerning Washington Post Radio and the *Onion*.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union in a timely fashion all of the information requested.

THE WASHINGTON POST

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor

Baltimore, MD 21202-4061

Hours: 8:15 a.m. to 4:45 p.m.

410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.